IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 29, 2006

JACKIE WILLIAM CROWE v. JAMES A. BOWLEN, WARDEN

Direct Appeal from the Criminal Court for McMinn County
Nos. 95-908, 95-910 Jerry Scott, Senior Judge

No. E2005-01210-CCA-R3-HC - Filed May 19, 2006

The petitioner, Jackie William Crowe, filed a petition for writ of habeas corpus challenging his two 1988 convictions for sexual battery, two 1996 convictions for incest, and two 1996 convictions for rape. After a hearing, the habeas corpus court granted the petition for the two 1996 rape convictions, finding that the petitioner's sentences were illegal and void. The habeas corpus court then remanded the petitioner to the trial court for resentencing of the 1996 rape convictions. The petitioner appeals, arguing: (1) the habeas corpus court lacked jurisdiction to remand his case to the trial court for resentencing; (2) his resentencing violates double jeopardy; (3) his new sentence violates the holding in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004); and (4) the resentencing court denied him the right to put on evidence at his resentencing hearing. Following our review, we affirm both judgments of the habeas corpus court and resentencing court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH and J.C. MCLIN, JJ., joined.

Wade V. Davies, Knoxville, Tennessee (on appeal) and Eugene G. Hale, Athens, Tennessee (at trial), for the appellant, Jackie William Crowe.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Jerry N. Estes, District Attorney General; and Chal Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

Procedural History

In 1988, the petitioner pled guilty to two counts of sexual battery and received consecutive five-year sentences, suspended to probation after serving one year in community corrections. His probation was revoked in 1996, based on pending rape and incest charges and this court affirmed the revocation. See State v. Jackie Crowe, No. 03C01-9606-CC-00225, 1997 WL 420779, at *4 (Tenn. Crim. App. July 29, 1997). In 1996, the petitioner was convicted of two counts of rape and two counts of incest and was sentenced as a Range I, standard offender, to twelve years for each rape conviction and six years for each incest conviction. The rape sentences were ordered to be served consecutively to each other and to the 1988 sexual battery sentences but concurrently with the incest sentences. On direct appeal, these convictions were affirmed by this court. See State v. Jackie Crowe, No. 03C01-9609-CR-00331, 1997 WL 618184, at *3 (Tenn. Crim. App. Sept. 8, 1997), perm. to appeal denied (Tenn. June 8, 1998).

In January 1998, the petitioner filed a *pro se* petition for post-conviction relief from his 1996 convictions alleging ineffective assistance of counsel. After a hearing on the merits, the post-conviction court denied the petition and this court affirmed. See Jackie William Crowe v. State, No. 98-034, 2000 WL 782015, at *1 (Tenn. Crim. App. June 20, 2000), perm. to appeal denied (Tenn. Jan. 8, 2001). Thereafter, the petitioner filed a *pro se* "Motion to Dismiss" the indictments underlying his 1996 convictions, alleging various defects. The trial court, finding the issues were previously addressed in the post-conviction proceeding, dismissed the motion. This court affirmed the dismissal and noted that although the motion alleged facts that would support a writ of habeas corpus, it could not properly be treated as such because, among other things, it failed to comply with the habeas corpus drafting requirements of Tennessee Code Annotated section 29-21-107 (2000). See Jackie William Crowe v. State, No. E2001-01559-CCA-R3-PC, 2002 WL 661925, at *1 (Tenn. Crim. App. Apr. 22, 2002).

In June 2002, the petitioner filed a *pro se* petition for writ of habeas corpus in the Bledsoe County Circuit Court, in which he alleged that the sentences for his 1988 and 1996 convictions were illegal. Pertinent to this appeal, the petitioner argued that although he was sentenced as a Range I, standard offender for both his 1996 rape sentences, the judgments were "illegally changed so as to designate [p]etitioner as a multiple child rapist." After appointing counsel to represent the petitioner, the habeas corpus court held a hearing on the petition on April 11, 2003. By order entered October 10, 2003, the court concluded that the petitioner's 1988 sentences and 1996 incest sentences were not illegal. The court, however, granted the petitioner habeas corpus relief as to the 1996 rape sentences, finding such sentences illegal, and remanded the matter to the trial court for resentencing:

> [T]he [p]etitioner alleges that he is being held under void judgments in . . . both rape convictions arising out of the Criminal Court of McMinn County, Tennessee. The [p]etitioner alleges that said judgments reflect a sentence of 12 years, standard, Range I, 30% sentence. Further, the [petitioner] alleges and is apparently correct that he has been classified by the Tennessee Department of Corrections as a multiple rapist and that multiple rapists, pursuant to T.C.A. 39-13-523, are required to serve their entire sentences and are not granted a release eligibility date. The Court finds that said sentences, as listed on the judgment, are illegal because the judgment form should

have indicated a classification as a multiple rapist and not a standard 30% Range I sentence. See, McLaney v. Bell, 59 S.W.3d 90 (Tenn. 2001). As such, the sentences are void, but since said sentences were a result of jury verdicts and not the basis for a plea bargain, [the 1996 rape cases] are remanded to the [Criminal] Court of McMinn County, Tennessee for resentencing.

Resentencing Hearing

On May 5, 2005, the McMinn County Criminal Court conducted a resentencing hearing for the petitioner's two 1996 rape convictions. The petitioner, the only witness to testify, told the court that the "Department of Corrections illegally altered [his] [rape] sentence, as far as changing it already from 30% to 100%." The resentencing court sentenced the petitioner as a multiple rapist to twelve years for each rape conviction to be served consecutively to his 1988 sexual battery convictions but concurrently with his 1996 incest convictions, for a total effective sentence of twenty-four years at 100%.

ANALYSIS

I. Jurisdiction of Habeas Corpus Court to Remand for Resentencing

A. Timeliness of Appeal

Before we may consider the merits of the petitioner's argument, we first will address the State's argument that the petitioner's appeal of the habeas corpus order is untimely. Pursuant to Tennessee Rule of Appellate Procedure 3(b), a petitioner may appeal as of right from the final judgment of the habeas corpus proceeding. The notice of appeal shall be filed within thirty days after the date of entry of the judgment. Tenn. R. App. P. 4(a). Rule 4(a) further provides, however, that in all criminal cases the notice of appeal is not jurisdictional and may be waived "in the interest of justice."

The habeas corpus court entered its order granting the petitioner relief in part on October 10, 2003, and the petitioner did not file his notice of appeal until May 27, 2005, well after the thirty-day period. We agree with the State that the petitioner only had thirty days from the date the habeas corpus court entered its judgment in which to file his notice of appeal concerning the jurisdiction of the court to remand him for resentencing. See Roy C. Smith v. James A. Bowlen, Warden, No. E2004-00833-CCA-R3-HC, 2005 WL 884993, at *3 (Tenn. Crim. App. Apr. 18, 2005), perm. to appeal denied (Tenn. Oct. 24, 2005) (explaining that the State only had thirty days from the date the trial court granted the habeas corpus petition in which to file its notice of appeal). However, according to the statements the petitioner made at his resentencing hearing, it was apparent that he believed he had to wait until after his resentencing hearing before he could appeal the habeas corpus court's decision. Accordingly, in the interest of justice, we waive the thirty-day requirement.

B. Remand for Resentencing

The petitioner argues that because his rape judgments were found void, "the proper relief was discharge from unlawful restraint," stating that the habeas corpus "court lacked jurisdiction to remand simply for resentencing to the McMinn County [Criminal] Court." The State responds that because only the petitioner's sentences were deemed void, his rape convictions remained intact. We agree with the State.

The grounds upon which habeas corpus relief may be granted in this state are narrow. Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004) (citations omitted). Relief will be granted if the petition establishes that the challenged judgment is void. Id. A judgment is void "'only when '[i]t appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered' that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired.'" Id. (quoting State v. Ritchie, 20 S.W.3d 624, 630 (Tenn. 2000) (citations omitted)). The petitioner bears the burden of establishing either a void judgment or an illegal confinement by a preponderance of the evidence. Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994).

There is no question that the petitioner's original 1996 rape sentences were illegal. "Sentencing is jurisdictional and must be executed in compliance with the 1989 [Criminal Sentencing Reform] Act." McConnell v. State, 12 S.W.3d 795, 798 (Tenn. 2000). A sentence that does not comport with the 1989 Act "is illegal and must be set aside." Id. at 800. However, "a judgment which is not compliant with the sentencing act is void or voidable depending upon whether the illegality of the sentence is evident on the face of the judgment or the record." McLaney v. Bell, 59 S.W.3d 90, 94 (Tenn. 2001) (citing Stephenson v. Carlton, 28 S.W.3d 910, 911 (Tenn. 2000)). Habeas corpus relief is only available for void, not voidable, judgments. Id.

According to Tennessee Code Annotated section 39-13-523(a)(2), a "'[m]ultiple rapist' means a person convicted two (2) or more times of violating the provisions of . . . § 39-13-503 [rape]." In addition, a multiple rapist "shall be required to serve the entire sentence imposed by the court undiminished by any sentence reduction credits such person may be eligible for or earn." Id. § 39-13-523(b). On the petitioner's original 1996 rape judgments, he was classified as a Range I, standard offender with a 30% release eligibility date. Under the 1989 Sentencing Act, however, he was required to be classified as a multiple rapist and to serve 100% of his sentence. We conclude that the habeas corpus court correctly determined that the petitioner's 1996 rape sentences were void and appropriately granted him habeas corpus relief.

However, the petitioner's contention that because his sentence was void he should be discharged is incorrect. Although a court is under the duty to grant a writ of habeas corpus "when properly applied for," Tenn. Code Ann. § 29-21-108(b) (2000), a petitioner shall only be discharged "[i]f no sufficient legal cause of detention is shown." Id. § 29-21-122(a) (2000). In addition, "[a]lthough the commitment of the person detained may have been irregular, still, if the court or judge is satisfied, from the examination, that the person ought to be . . . committed, either for the

offense charged, or any other, the order shall be made accordingly." Id. § 29-21-123 (2000). In McLaney, the petitioner argued that his sentences, which he agreed to in a plea agreement, were void because they were not run consecutively to an earlier sentence as required by the 1989 Act. Our supreme court explained:

> If McLaney's allegations . . . are proven in the record of the underlying convictions, then the sentence is void and the habeas corpus court is mandated by statute to declare it so. *If the sentence is void, then either the plea may be withdrawn or the conviction remains intact.* If the plea is withdrawn, then McLaney would be ordered held to bail pending prosecution for the offense; *if the conviction remained intact, then he would be committed to custody pending resentencing*. Thus, there is legal cause for continued detention pending further proceedings. Therefore, the habeas corpus court would be required, after voiding the judgment, to remand the case to the trial court, . . ., for further appropriate action.

McLaney, 59 S.W.3d at 94-95 (emphasis added). Here, there was no plea agreement and, instead, the petitioner's jury convictions simply remained intact. Accordingly, the habeas corpus court was correct in remanding the matter to the trial court for resentencing.

II. Double Jeopardy

The petitioner argues that "[r]esentencing [him] to a higher sentence after the judgment has become final violates state and federal constitutional protection against double jeopardy." On appeal, he "acknowledges that Tennessee case law has allowed resentencing after judgments have become final where the [c]ourts have concluded that the judgment was unlawful" but argues "that double jeopardy principles would prohibit this practice, however, since this is a material change in the sentence and not merely the correction of a clerical error." The State responds that the petitioner's "protection against double jeopardy was not infringed in this case because the [petitioner] was not tried twice for the rapes he committed." We agree with the State. The petitioner was merely resentenced, not retried, for the rape convictions. This issue is without merit.

III. Blakely v. Washington

The petitioner argues that "the resentencing court violated the Sixth Amendment as interpreted by Blakely v. Washington by enhancing the sentence based on factors not admitted by [him] and not found by a jury beyond a reasonable doubt." In State v. Gomez, 163 S.W.3d 632, 661 (Tenn. 2005), our supreme court held that the Blakely decision does not apply to Tennessee sentencing guidelines. In addition, we note that the evidence the resentencing court used to enhance the petitioner's sentence was admitted at the resentencing hearing without any objection from the petitioner. This issue is without merit.

IV. Evidence at Resentencing Hearing

The petitioner argues that the resentencing court "denied [him] the right to put on evidence at the sentencing hearing." At the hearing, the court stated that "in fairness to the [petitioner], [the court] need[s] to hear anything that's to be . . . on the issue of sentencing." Although the petitioner subpoenaed his ex-wife and daughter, who was the victim, neither had been served as there was no address listed for them. The transcript of the resentencing hearing shows the court allowed the petitioner to talk at length. This claim is without merit.

V. Resentencing

Although not explicitly set out as a separate issue by petitioner, the State contends that he is also appealing whether the resentencing court properly resentenced him. As to the issue of whether the habeas corpus court had the jurisdiction to remand the matter for resentencing, the petitioner asserted that "[t]he remedy of habeas corpus, designed for relief from unlawful confinement, simply cannot be used to increase a sentence." In addition, in his reply brief, the petitioner states that his "entire brief deals with the issue of whether the courts had the authority to resentence [him] to a higher sentence." Also in this brief, the petitioner states his "position is that the weighing of aggravating and mitigating factors is not ripe for this [c]ourt's review." Nowhere in either brief does the petitioner explain how he believes his sentence was increased. He was originally sentenced to two consecutive twelve-year sentences. On resentencing, he received the same sentence. The only change was his status, which went from a Range I, standard offender to a multiple rapist. This issue is without merit.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the judgments of the habeas corpus court and resentencing court.

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ALAN E. GLENN, JUDGE